

82-1097

No. 82-

Supreme Court, U.S.

FILED

DEC 30 1982

ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1982

EAGLE-PICHER INDUSTRIES, INC.,
CONDITIONAL CROSS-PETITIONER,

v.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
CONDITIONAL CROSS-RESPONDENTS.

ON CONDITIONAL CROSS-PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

EAGLE-PICHER INDUSTRIES, INC.'S CONDITIONAL
CROSS-PETITION FOR A WRIT OF CERTIORARI

CHARLES R. PARROTT
(*Counsel of Record*)

JOSEPH J. HURLEY

NUTTER, MCCLENNEN & FISH

Federal Reserve Plaza

600 Atlantic Avenue

Boston, MA 02210

(617) 973-9700

*Counsel for Conditional Cross-Petitioner,
Eagle-Picher Industries, Inc.*

QUESTION PRESENTED

Whether, in the event the Court grants the Petition for a Writ of Certiorari in No. 82-869, the Court should decide that certain policies of insurance purchased by Eagle-Picher Industries, Inc. ("Eagle-Picher") provide coverage for underlying asbestos related claims on a comprehensive coverage basis, whereby each insurer on the risk between the initial exposure to asbestos and the manifestation of disease is severally liable to Eagle-Picher for indemnification and defense costs.

List of Parties

Conditional Cross-Petitioner Eagle-Picher Industries, Inc.¹ was the plaintiff in the district court, an appellant and appellee in the First Circuit, and is a respondent in No. 82-869.

Conditional Cross-Respondents Philip Alan Froude, on his own behalf and as representative of Certain Underwriters at Lloyd's, London, Turegum Insurance Company, Ltd., and Excess Insurance Company, were defendants in the district court, appellants as well as appellees in the First Circuit, and are petitioners in No. 82-869.

Conditional Cross-Respondents Liberty Mutual Insurance Co., John Basil Thomas Bird, on his own behalf and as representative of Certain Underwriters at Lloyd's, London, Walbrook Insurance Co., Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Co., Ltd., London and Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.)

¹ In compliance with Rule 28.1, Eagle-Picher states that it has no parent company and that its only non-wholly owned subsidiary is Diehl & Eagle-Picher GmbH.

II

Ltd., Dominion Insurance Company, Ltd., Yasuda Fire & Marine Insurance Company (U.K.) Ltd., Bellefonte Insurance Company, Mentor Insurance Company (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, and Slater, Walker Insurance Company, Ltd. were defendants in the district court, appellees in the First Circuit, and are respondents in No. 82-869.

Conditional Cross-Respondents, American Motorists Insurance Company was a defendant in the district court, appellant as well as appellee in the First Circuit, and is a respondent in No. 82-869.

III

TABLE OF CONTENTS

	Page
Question Presented.....	I
List of Parties.....	II
Table of Contents.....	III
Table of Authorities.....	III
Opinions Below.....	2
Jurisdictional Statement.....	2
Constitutional and Statutory Provisions.....	2
Statement of the Case.....	2
Reasons for Allowing the Conditional Cross-Petition....	6
I. Comprehensive Coverage Is, As the Froude Petitioners Concede, An Integral Aspect Of The Issue For Which Review Is Sought In No. 82-869.....	6
II. Comprehensive Coverage Is The Correct Inter- pretation of Eagle-Picher's Liability Insurance Policies.....	7
Conclusion.....	9

TABLE OF AUTHORITIES

Cases

- Keene Corp. v. Insurance Company of North America*,
667 F.2d 1034 (D.C. Cir. 1981), cert. denied,
U.S. , 102 S.Ct. 1644 (1982).....5, 7

Other

- Restatement of Torts (Second) §402A, Comment c..... 8

**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

No. 82-

**EAGLE-PICHER INDUSTRIES, INC.,
CONDITIONAL CROSS-PETITIONER,**

v.

**LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
CONDITIONAL CROSS-RESPONDENTS.**

**ON CONDITIONAL CROSS-PETITION FOR WRIT A
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT**

**EAGLE-PICHER INDUSTRIES, INC.'S CONDITIONAL
CROSS-PETITION FOR A WRIT OF CERTIORARI**

Eagle-Picher Industries, Inc. ("Eagle-Picher") respectfully requests the Court, only in the event that it grants the Petition for a Writ of Certiorari in No. 82-869,² to grant this Conditional Cross-Petition for a Writ of Certiorari and review the First Circuit's rejection of comprehensive coverage, which Eagle-Picher contends is the correct application of its insurance policies.

² Eagle-Picher opposes the petition in No. 82-869 ("Froude petition") and has contemporaneously filed with this conditional cross-petition, under separate cover, a Brief in Opposition.

Opinions Below

The opinions below are contained in Appendix A and Appendix B to the Froude Petition in No. 82-869 and are incorporated by reference herein. In this conditional cross-petition, citation to the opinions below appears as "Pet. App."

Jurisdictional Statement

The opinion and judgment of the First Circuit was entered on June 30, 1982. On August 30, 1982, petitions for rehearing were denied and on September 1, 1982, suggestions for rehearing *en banc* were denied. Pet. App., at A1, A2.

On November 30, 1982, Eagle-Picher received the Petition for a Writ of Certiorari in No. 82-869, in which it is a respondent. That petition seeks review of the opinion and judgment of the First Circuit, conditional review of which is sought by this cross-petition. Eagle-Picher relies upon Rule 19.5 in filing this conditional cross-petition.

Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

No constitutional or statutory provisions are involved in this conditional cross-petition.

Statement of the Case

Eagle-Picher is a diversified industrial manufacturer. For approximately forty years ending in 1971, one of its divisions manufactured insulation products containing asbestos. Eagle-Picher has been named as a defendant in a staggering number of lawsuits alleging personal injury resulting from exposure

to asbestos-containing products ("underlying claims"). Beginning as a trickle of cases in the late 1960's, underlying claims filed against Eagle-Picher now total more than 16,000, with the number increasing at a rate approaching 500 per month.³

During the period January 1, 1968 to January 1, 1979, Eagle-Picher purchased, and was insured for underlying claims under, several comprehensive general liability insurance policies issued by petitioners and other insurers. Policies were sold to Eagle-Picher by several different insurers at both primary and excess insurance levels. Although the language of the policies at issue varies in some respects, all provide coverage to Eagle-Picher if the underlying claimant suffered bodily or personal injury during the policy period.

In October 1978, faced with conflicting positions asserted by its insurers regarding the extent of its coverage under its policies, Eagle-Picher filed the instant declaratory judgment action in federal district court based upon diversity of citizenship jurisdiction under 28 U.S.C. § 1332. The complaint sought a declaration of the rights and obligations of the parties to certain policies of insurance purchased by Eagle-Picher.⁴

³ The approximate number of asbestos related cases filed annually against Eagle-Picher is listed below.

1966	1	1972	2	1978	920
1967	0	1973	2	1979	2365
1968	0	1974	16	1980	3217
1969	3	1975	41	1981	5116
1970	2	1976	102	1982	4242
1971	3	1977	364	(through October 1982)	

⁴ Eagle-Picher's insurance at issue in this lawsuit are (a) its primary level insurance for the period January 1, 1968 through January 1, 1979, provided by Liberty Mutual Insurance Company ("Liberty Mutual"), (b) its first layer excess insurance for the period June 1, 1973 through October 10, 1975, provided by American Motorists Insurance Company ("American Motorists"), (c) its first layer excess insurance for the period October 10, 1975 through January 1, 1979, provided by the London Market, and (d) its second layer excess coverage for the period September 19, 1973 to January 1, 1979, provided by the London Market.

The London Market refers to the insurance companies and underwriters at Lloyd's, London which subscribed to the first layer excess policy covering

Prior to the commencement of this action, the insurance companies providing liability coverage to Eagle-Picher had split into two camps, each of which advocated a different, but limited, interpretation of their policies' application to underlying claims. Some insurers, namely the Froude petitioners and respondent American Motorists, contended that coverage is triggered at the time the claimant is exposed to the asbestos-containing product. Under this interpretation, generally referred to as the exposure theory, the insured is covered on a pro-rata basis for liability arising from underlying claims in which the claimant was *exposed* to the insured's asbestos-containing product during the policy period. The other insurers, namely respondent Liberty Mutual and the Bird respondents, argued for the manifestation theory, under which coverage is triggered at the time the injury first manifests itself, generally many years after the initial exposure. Under this theory, the insured is covered only for liability arising from underlying claims in which the claimant *manifested* the asbestos related injury during the policy period.

Throughout this case, Eagle-Picher has maintained that it purchased the broadest coverage available from the insurance industry—coverage intended to provide certainty to Eagle-Picher. Faced in the district court with the choice between the two narrow interpretations framed by the insurers, Eagle-Picher advocated the manifestation theory—the interpretation which, when compared to the exposure theory, seemed at that time better to fulfill the insurance promise.

October 10, 1975 through January 1, 1979 and the second layer excess policies covering September 1, 1973 to January 1, 1979. One portion of the London Market, including Philip Alan Froude—a representative of certain Lloyd's underwriters, Turegum Insurance Company, Ltd. and Excess Insurance Company, espoused the exposure theory of coverage. The remaining portion of the London Market, referred to collectively as the Bird respondents, espoused the manifestation theory of coverage.

Eagle-Picher's coverage is graphically shown in Appendix A to the district court opinion. Petitioner's Opinion Appendix (hereinafter "Pet. App."), B18.

After a short non-jury trial, the district court, on August 14, 1981, filed an opinion and judgment adopting the manifestation theory. Prior to the appeal of this case to the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the District of Columbia Circuit, in an asbestos insurance case, announced a third and comprehensive interpretation of typical liability insurance policies containing language substantially similar to that here at issue. *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, U.S. , 102 S. Ct. 1644 (1982). The D.C. Circuit, rejecting the coverage theories advocated by both insurers and insured, *id.* at 1047 n.25, instead adopted a theory of comprehensive coverage under which coverage is triggered by initial exposure, development of the disease, and manifestation of the disease or injury. Under comprehensive coverage, each insurer "on the risk" between the initial exposure to asbestos and the manifestation of a resultant disease is severely liable to its insured, without proration for liability and defense costs, up to the liability limits of the policy.

Subsequent to the D.C. Circuit's decision *Eagle-Picher* filed a cross-appeal in the First Circuit and moved in that court for an order remanding the case to the district court for reconsideration in light of *Keene* and to enable the district court to receive evidence relevant to comprehensive coverage which had been ruled irrelevant in the manifestation versus exposure trial. The First Circuit denied the motion.

On June 30, 1982, the First Circuit affirmed the district court decision, with a modification of the meaning of manifestation to "the date when the asbestos-related disease became reasonably capable of medical diagnosis." Pet. App., A4. Additionally, the court affirmed the district court's discretionary denial of Froude's motion to transfer the case. *Id.*, A8 n.1.

Reasons for Allowing the Conditional Cross-Petition

I. COMPREHENSIVE COVERAGE IS, AS THE FROUDE PETITIONERS CONCEDE, AN INTEGRAL ASPECT OF THE ISSUE FOR WHICH REVIEW IS SOUGHT IN NO. 82-869.

The Froude petition requests the Court to review the opinion and judgment of the First Circuit. In the event that the Court grants the Froude petition, this conditional cross-petition should also be granted.⁵

The correctness of comprehensive coverage is an expressed and integral aspect of the issue framed in the Froude petition. In their "Questions Presented" section, the Froude petitioners frame the issue, *inter alia*, as "whether insurer liability under Comprehensive Liability Insurance policies is triggered...during the entire period a claimant is exposed to asbestos, as well as the time the asbestos particles remain 'in residence' in the lung up to the time of manifestation ('Keene' position)." Froude petition, at i-ii. That is the policy interpretation (referred to herein as comprehensive coverage)⁶ that Eagle-Picher will urge the Court to adopt if the Froude petition is granted.

As detailed in the Statement of the Case, Eagle-Picher maintained as appellant in the First Circuit the correctness of comprehensive coverage. In its opinion, the First Circuit rejected comprehensive coverage while affirming the manifestation result. Thus, this Court's review of the issue presented, i.e. the interpretation to be given Eagle-Picher's comprehensive general liability insurance policies must include consideration of the comprehensive coverage theory set forth in *Keene*.

⁵ Of course, if the Court denies the Froude petition, the Court should not consider this conditional cross-petition. Supreme Court Rule 19.5. Given the Froude petitioners' express request for review of comprehensive coverage, this conditional cross-petition may be surplusage. It is filed, nevertheless, to preserve Eagle-Picher's rights in the event that the Court grants review.

⁶ Comprehensive coverage is more fully described in note 7, *infra*.

II. COMPREHENSIVE COVERAGE IS THE CORRECT INTERPRETATION OF EAGLE-PICHER'S LIABILITY INSURANCE POLICIES.

If the Froude petition is granted, review of the issue raised therein should not be limited artificially—as it was in the district court—to the insurers' proffered choice of manifestation or exposure. Comprehensive coverage is the only policy interpretation which comports with the policy language and the medical testimony, honors the reasonable expectations of insureds, and does justice to public policy rationales reflected in both insurance principles and the underlying product liability claims.

The policy language at issue promises the insured coverage for all sums the insured is legally obligated to pay as damages arising from injury to a third person. Each of the insurers' theories—manifestation or exposure—provide fractional rather than comprehensive or general coverage. The etiology of asbestos related disease, to the extent that it is medically understood, confirms the indivisible injurious process which, under comprehensive coverage, triggers the insurance promise to pay all sums for which the insured is legally liable.

In construing the policies' coverage of liability for asbestos related disease, the nature of insurance must be recognized and its purpose be given effect. When an insurance contract is purchased, the insured exchanges an uncertain loss (e.g., liability in an unknown amount to persons suffering from asbestos related diseases) for a certain loss (the premium payment). *Keene*, 667 F.2d at 1041. In exchange for a premium payment, the insured is entitled to receive certainty—a valuable commodity which allows the insured to conduct its business in an orderly manner. *Id.*

Insurers contend that bodily injury occurs either when the disease manifests itself or when the claimant is exposed to an asbestos-containing product. Each of those theories is overly

narrow and threatens the purchaser of insurance with uninsured liability for claims unknown to it at the time the insurance was purchased. Manifestation alone leaves the insured without coverage for suits by claimants who develop asbestos related disease during the policy period, but do not manifest the disease until after the policy period. Exposure alone leaves the insured without coverage for suits by claimants exposed to asbestos-containing products prior to the policy period. Under either manifestation or exposure, the certainty purchased has been negated. In contrast, comprehensive coverage, by recognizing—consistent with the medical evidence—that bodily injury is any part of the single injurious process that asbestos related disease entails,⁷ provides the certainty for which Eagle-Picher paid substantial insurance premiums.

In addition to fulfilling the reasonable expectations of Eagle-Picher, comprehensive coverage also comports with sound public policy considerations. Most of the underlying claims state a cause of action under theories of strict product liability. The cornerstone of modern strict liability law is the public policy of transferring and spreading the risk of injury to manufacturers of products who can better bear the risk of loss and *who can insure against that risk*. Restatement of Torts (Second) §402A, Comment c. This public policy, recognized in the underlying suits, is sustainable only to the extent manufacturers (such as Eagle-Picher) are able to purchase insurance which provides meaningful coverage for such liability. Only the comprehensive coverage theory of interpretation is consistent with the public policy of transferring and spreading risk.

⁷ If injury occurs during the policy period, the insurer on that policy must provide coverage for the full amount of the resulting damages, regardless of whether only the beginning or end of the injury (i.e., exposure or manifestation) occurred during the policy period. The injury, in other words, is conceptually indivisible. See, *Keene*, 667 F.2d at 1047-49. The insurer is never required to provide insurance, however, in an amount more than it promised to pay. Each policy contains a liability limit which caps the insurer's obligation.

Conclusion

For the foregoing reasons, Eagle-Picher respectfully requests that, if the Court grants the Petition for a Writ of Certiorari in No. 82-869, then it should also grant Eagle-Picher's Conditional Cross-Petition for a Writ of Certiorari and determine the applicability of comprehensive coverage.

Respectfully submitted,

CHARLES R. PARROTT
(*Counsel of Record*)

JOSEPH J. HURLEY

NUTTER, MCCLENNEN & FISH

Federal Reserve Plaza

600 Atlantic Avenue

Boston, MA 02210

(617) 973-9700

*Counsel for Conditional Cross-Petitioner,
Eagle-Picher Industries, Inc.*